

**IN THE
SUPREME COURT OF OHIO**

STATE OF OHIO	:	NO. 1995-0042
Plaintiff-Appellee	:	This Is A Capital Case.
vs.	:	
JEFFREY WOGENSTAHL	:	
Defendant-Appellant	:	

STATE'S MEMORANDUM IN OPPOSITION TO JEFFREY WOGENSTAHL'S MOTION TO VACATE HIS EXECUTION DATE AND TO RE-OPEN HIS DIRECT APPEAL
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MEMORANDUM

Wogenstahl has filed a motion to vacate his execution date and re-open his direct appeal.

FACTS

Wogenstahl was convicted of aggravated murder, kidnapping and aggravated burglary, and sentenced to death, for his brutal killing of ten-year old Amber Garrett in 1991. This Court ultimately affirmed Wogenstahl's convictions, noting it was "absolutely convinced" the evidence proved Wogenstahl's guilt beyond a reasonable doubt. Blood and plant material evidence linked Wogenstahl to Amber's murder. Wogenstahl admitted to Bruce Wheeler (a fellow inmate in the Justice Center) that he kidnaped, raped and stabbed Amber and then dumped her body. The evidence against Wogenstahl was overwhelming.

A review of the facts of Wogenstahl's murder of Amber Garrett is reproduced below from the Court of Appeals' November 12, 2004 decision.¹

"Anyone who has lived in Cincinnati long enough probably remembers the murder of ten-year-old Amber Garrett and the media attention it received more than a decade ago. Amber was taken from her home while she slept one November morning in 1991. Her body was found several days later in the woods near the side of a road in Indiana. Amber had lived with her mother, Peggy Garrett; her half-brothers, Eric and Justin Horn; her brother, Matthew Garrett; and her half-sister, Shayna Perkins. (Justin was not home at the time and did not testify, so we refer to Eric as "Horn.")

Wogenstahl, an acquaintance of the family, had recently broken up with his girlfriend and had fallen on hard times. He knew the Garrett family and had stopped by one afternoon to see what Peggy was doing later that day. The two did not make any plans for the night. Later, Peggy decided to go out for the evening. She left Horn, then 16 years old, to watch Amber, Matthew, and Shayna, who were all sleeping in Peggy's room. Peggy did not actually tell Horn that all three children were at home – an oversight that would later delay the investigation.

¹ *State v. Wogenstahl*, C-030945 (Ham. App. 11-12-04).

Peggy saw Wogenstahl later at a local bar where they talked and had a few drinks. The two, along with Peggy's friend Lynn Williams, went outside and smoked marijuana in a car in the parking lot. They then went to another bar for a short time before driving back to get Wogenstahl's car. He asked if they wanted to come back to his apartment to smoke more marijuana, but the two women decided to go to the Waffle House instead.

* * * Horn testified that Wogenstahl came to the Garrett home shortly after 3:00 a.m. and told him that Peggy needed to talk to him at her friend Troy Beard's house. Horn did not have a key (he usually slept at his grandfather's trailer during the day – there was not enough room in the Garrett house for all the people to sleep at once), so the door was locked once he left. Wogenstahl then drove Horn part of the way to Beard's house and dropped him off. When confronted about this after Amber's disappearance, Wogenstahl claimed that he was just "messing with" Horn. As the case against him developed, Wogenstahl changed his story. According to the new story, Horn had asked to go to Beard's so that he could deliver some marijuana to Peggy.

Regardless of his motives, Wogenstahl drove Horn to a location a block or two away from Beard's apartment. Horn woke up a confused Beard, who said that Peggy had not been at his apartment. Horn then walked home to find the door ajar. He checked on the children. Seeing only Matthew and Shayna, he mistakenly assumed that Amber had spent the night at a friend's house. Then he left at 5:00 a.m. to go to his grandfather's, he did not tell Peggy that Amber was missing.

Peggy later noticed that Amber was gone, but assumed she had taken the bus to church alone, as she often had done in the past. It seems that nobody realized anything was wrong until much later in the day, after the church bus had returned without Amber on it.

The local media and police put a lot of effort into the search for Amber. Several days passed. Eventually, an Indiana man heard news of the missing girl and remembered seeing a car stopped near his house the night that Amber disappeared. He called a police officer, who then discovered Amber's body down a hill in the brush off the side of the road.

The investigation quickly focused on Wogenstahl. He was charged with Amber's kidnapping and aggravated murder, as well as the aggravated burglary of the Garrett home.

The evidence at trial included testimony from witnesses who saw Wogenstahl or his car on the side of the road around 3:40 a.m., near where Amber's body was later found. Plant particles were found in Wogenstahl's leather jacket and shoes, and those particles were similar to blackberry bushes and other plant life found near Amber's body. The same leather jacket had been in

good condition when Wogenstahl, Peggy, and Williams were out together; the next day, it was scratched as if it had been through a brushy area.

Blood was found in Wogenstahl's apartment and car. The blood in his car matched Amber's blood characteristics. Only one in 19 people would have had the same blood characteristics. And finally, Bruce Wheeler – an inmate who shared a pod with Wogenstahl in the county jail – testified that Wogenstahl had confessed the crimes to him. He gave details of the abduction and murder that were consistent with the other evidence that had already been presented in the case. The jury found Wogenstahl guilty of all the charges.”

This Court affirmed Wogenstahl's convictions and sentence of death on March 6, 1996.²

**WOGENSTAHL'S SUBJECT MATTER JURISDICTION CLAIM FAILS
ON ITS MERITS**

Citing *State v. Yarbrough*,³ Wogenstahl contends that his decades old aggravated murder conviction should be voided due to a lack of subject matter jurisdiction. However, *Yarbrough* did not and does not apply retroactively.⁴ In *Yarbrough*, this Court did not recognize a new state right that would apply retroactively, nor did it overrule prior case law.⁵

Moreover, Wogenstahl was appropriately subject to criminal prosecution in Ohio under Ohio's criminal law jurisdictions statute. It read:

R.C. 2901.11

(A) A person is subject to criminal prosecution and punishment in this state if any of the following occur:

(1) The person commits an offense under the laws of this state, any element of which takes place in this state.

(2) While in this state, the person conspires or attempts to commit, or is guilty of complicity in the commission of, an offense in another jurisdiction, which offense is an offense under both the laws of this state and the other jurisdiction.

² *State v. Wogenstahl*, 75 Ohio St.3d 344, 662 N.E.2d 311, 1996-Ohio-219.

³ 104 Ohio St.3d 1, (2004)

⁴ *State v. Herring*, 2007 WL 1806085, 2007-Ohio-3174.

⁵ *Id.*

(B) In homicide, the element referred to in division (A)(1) of this section is either the act that causes death, or the physical contact that causes death, or the death itself. If any part of the body of a homicide victim is found in this state, the death is presumed to have occurred within this state.

* * *

(D) When an offense is committed under the laws of this state, and it appears beyond a reasonable doubt that the offense or any element of the offense took place either in this state or in another jurisdiction or jurisdictions, but it cannot reasonably be determined in which it took place, the offense or element is conclusively presumed to have taken place in this state for purposes of this section. (Boldface added.)

Here, Amber's blood was found in Wogenstahl's Oldsmobile which was recovered in Ohio. Blood was part of Amber's body, so jurisdiction was appropriate under R.C. 2901.11(B).

WOGENSTAHL'S CLAIM IS APPROPRIATELY DIRECTED TO THE TRIAL COURT – NOT THIS COURT

Wogenstahl cites to *State v. Wilson*⁶ for the proposition that subject-matter jurisdiction can be raised at any time and cannot be waived. But *Wilson* contemplates the claim be first addressed to the trial court – not directly to this Court.

Wilson cites to R.C. 2953.21(A) which states:

“Any person convicted of a criminal offense or adjudged delinquent claiming that there was such a denial or infringement of his rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, may file a petition at any time in the court which imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief.”

Wilson contemplates that Wogenstahl's claim be presented to his trial court first. And Wogenstahl did present this claim to his trial court. On July 30, 2014, Wogenstahl filed “Motion to Reverse Conviction for Aggravated Murder For Lack Of Subject Matter Jurisdiction” in the trial court making the very same argument he makes here. The trial court cannot rule on it

⁶ 73 Ohio St.3d 40, 652 N.E.2d 196, 1995-Ohio-217

however because the trial court lost jurisdiction to act when Wogenstahl appealed the denial of a prior post-conviction petition to the Court of Appeals.⁷ Once that appeal is decided, the trial court can rule on Wogenstahl's July 3, 2014 petition. The State submits that Wogenstahl's request of this Court to rule on the issue is premature. This Court should defer ruling on the issue until Wogenstahl's sentencing court has had the opportunity to rule on the claim as contemplated by *Wilson*⁸ and R.C. 2953.21(A).

WOGENSTAHL'S MOTION FAILS AS A RE-OPENING OF HIS APPEAL

First, although Wogenstahl captions his motion as one "To Re-open his Direct Appeal," he makes no argument addressing ineffective assistance of appellate counsel. For this reason alone, his motion, as captioned, is properly denied.

Secondly, Wogenstahl has failed to utilize the appropriate vehicle to make a claim of ineffective assistance of appellate counsel. Because Wogenstahl committed his murder before January 1, 1995, S.Ct. Prac. R. 11.06 does not apply to his case. Claims of ineffective assistance of appellate counsel for offenders like Wogenstahl are governed by the law at the time as set forth in *State v. Murnahan*.⁹ In *Murnahan*, this Court established the framework for such claims. This Court held in relevant part:

2. Claims of ineffective assistance of appellate counsel may be raised in an application for reconsideration in the court of appeals or in a direct appeal to the Supreme Court pursuant to Section 2(B)(2)(a)(iii), Article IV of the Ohio Constitution. (*In re Petition of Brown* [1990], 49 Ohio St.3d 222, 223, 551 N.E.2d

⁷ On October 30, 2014, the trial court denied defendant's Motion for Leave to File a Motion for New Trial. On November 26, 2014, Wogenstahl filed a Notice of Appeal of that judgment, under C-140683. The appeal is pending.

Once Wogenstahl filed the Notice of Appeal, the trial court lost jurisdiction to act on any pending motions. See *State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661; ¶ 8; *State v. Dye*, 1st Dist. Hamilton No. C-130533, June 18, 2014.

The trial court can rule on Wogenstahl's Motion to Reverse the Conviction of Aggravated Murder and to Vacate the Attendant Death Sentence for Lack of Subject-Matter Jurisdiction after C-140683 is concluded – but not before.

⁸ *supra*

⁹ 63 Ohio St.3d 60, 584 N.E.2d 1204, (1992)

954, 955; *Manning v. Alexander* [1990], 50 Ohio St.3d 127, 553 N.E.2d 264, followed.)

3. Where the time period for reconsideration in the court of appeals and direct appeal to the Supreme Court has expired, a delayed claim of ineffective assistance of appellate counsel must first be brought in an application for delayed reconsideration in the court of appeals where the alleged error took place, pursuant to App. R. 26 and 14(B), and if delayed reconsideration is denied then the defendant may file for delayed appeal in the Supreme Court, pursuant to Section 8, Rule II of the Rules of Practice of the Supreme Court.

Thus, if Wogenstahl wishes to re-open his appeal, he must file an application for delayed reconsideration in the Court of Appeals pursuant to App. R. 26 and 14(B). Only if that is denied may Wogenstahl then file for delayed appeal in this Court.

Wogenstahl's present filing is mis-captioned, premature and not cognizable in this Court.

CONCLUSION

Jeffery Wogenstahl's Motion to Vacate his Execution Date and to Re-Open is Direct Appeal is properly denied.

Respectfully,

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PROOF OF SERVICE

I hereby certify that I have sent a copy of the foregoing document, by United States mail, addressed to Office of the Ohio Public Defender, Kimberly S. Rigby (0078245), Assistant State Public Defender, and to Elizabeth Arrick (0085151), Assistant State Public Defender, at 250 East Broad Street, Suite 1400, Columbus, Ohio 45215, this 19th day of October, 2015.

/s/Philip R. Cummings

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